

LIFE IS GOOD, INC. V. LG ELECTRONICS U.S.A., INC
Civil Action No. 04 11290 WGY

DECLARATION OF TIMOTHY LEMPER IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE
TO STRIKE THE SURVEY OF PLAINTIFF'S EXPERT ROBERT KLEIN

Exhibit 2

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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LIFE IS GOOD., INC.,

Plaintiff,

Civil Action

vs.

No. 04-cv-11290-REK

LG ELECTRONICS, U.S.A., INC.,

LG ELECTRONICS MOBILECOMM

U.S.A., INC., (formerly

LG INFOCOMM U.S.A., INC.),

Defendants.

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DEPOSITION OF ROBERT KLEIN, a witness called by
and on behalf of the Defendants, taken pursuant to
the provisions of the Federal Rules of Civil
Procedure, before Dana Welch, a Registered
Professional Reporter and Notary Public in and
for the Commonwealth of Massachusetts, at the
offices of Finnegan, Henderson, Farabow, Garrett
& Dunner, LLP, 55 Cambridge Parkway, Suite 700,
Cambridge, Massachusetts, on Friday, January 24,
2006, commencing at 10:31 a.m.

ORIGINAL

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1 Q. And so you could be measuring the wrong
2 thing?

3 A. I think that would be the argument.

4 Q. How about Adidas, did you do a survey for
5 that case?

6 A. No.

7 Q. Was that a trademark case?

8 A. Yes.

9 Q. Did you deal with Michael Heilbronner at
10 Adidas in any way?

11 A. Not that I know of.

12 Q. And what did you do for Adidas?

13 A. I provided a rebuttal report on behalf of
14 ES Originals to a survey that had been conducted by
15 -- on behalf of Adidas.

16 Q. Did you work with Lisa Perrone?

17 A. The name is familiar, but I don't think she
18 was -- I don't recall her from that matter.

19 Q. Whose survey did you rebut?

20 A. I believe it was Gerald Ford's.

21 MR. KIRBY: Not the President.

22 THE DEPONENT: No.

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1 BY MR. RETTEW:

2 Q. From Ford, Bubala & Associates?

3 A. Yes.

4 Q. And briefly, what was the nature of your
5 critique?

6 A. I felt that the product shown to people was
7 not shown in a -- as they would see it and encounter
8 it in the real world. And I had some issues with
9 the control that was -- that was used in the case.

10 Q. When you say the stimulus was not what
11 people would see in the real world, what
12 specifically did they use in that survey?

13 A. They used a drawing from a shoe as seen
14 from kind of, if you were lying on the floor looking
15 at it sideways. And the allegations of the case had
16 to do with initial interest, confusion where you
17 might see it -- someone wearing the shoe and ask
18 where did you buy that.

19 Q. So what's wrong with showing a drawing?

20 A. Well, in this particular matter, they were
21 claiming that people would see the shoe as someone
22 else were wearing it. And so if that's the claim,

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1 then why not show it that way.

2 Q. So they should have shown the actual shoe?

3 A. Or a picture of the shoe or a picture of a
4 model wearing a shoe.

5 Q. And was this an Eveready format that Ford
6 did?

7 A. Basically, yes.

8 Q. What control did he use?

9 A. He used an all-white shoe that -- that
10 removed both the offending stripes, as well as some
11 other identifying characteristics. And I had some
12 problems with the fact that he took the other
13 identifying characteristics off as well.

14 Q. What's wrong with that?

15 A. Well, if you're alleging that there is --
16 that the infringing feature is the stripes on the
17 shoe, and you don't have any problem with the heel
18 patch, then to have a control that is missing both
19 the stripes and the heel patch is confounding the
20 issue.

21 Q. Because it's not measuring true noise in
22 that case?

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1 A. If the -- if the target market corresponds
2 to the actual market, then it becomes relevant. But
3 from a marketing point of view, you might target,
4 you know, girls 14 to 25, but your product might be
5 bought by anyone.

6 And so with your advertising, you might
7 target a particular segment, but if the product
8 could be bought and was bought by virtually
9 everyone, then narrowing the universe to that target
10 market would be inappropriate.

11 Q. Did you test forward or reverse confusion
12 in this case?

13 A. In this case, it really wasn't a -- an
14 issue of reverse confusion or forward confusion,
15 given the widespread distribution and purchasing --
16 widespread distribution of the purchasing population
17 for both the products. The overlap is so huge that
18 whether it's forward or reverse confusion wasn't a
19 problem here.

20 Q. What's your understanding of what forward
21 confusion is?

22 A. Forward confusion would be a situation in

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1 which the potential purchasers of the junior user
2 are confused and think that the product comes from
3 the senior user.

4 Q. And reverse confusion?

5 A. Where potential purchasers of the senior
6 product are confused and think that the product
7 comes from the junior user.

8 Q. And just so I understand your testimony,
9 are you saying that you tested one, the other or
10 both?

11 A. Either. Because -- well, either.

12 Q. So it's possible to do a confusion survey
13 where you're testing both forward and reverse
14 confusion with the same set of questions?

15 A. Yes.

16 Q. In this case, did you ask people whether --
17 you asked people -- strike that.

18 Okay. Let's talk about LG. What's your
19 understanding of what LG makes?

20 A. It's my understanding that LG makes a wide
21 variety of electronics, from cell phones to TVs to
22 computer monitors to refrigerators, washers, dryers,

1 alternatives for how to display that.

2 Q. Is it your understanding that the only
3 objectionable part of LG's logo was the words
4 "Life's Good"?

5 MR. KIRBY: Object to the form.

6 THE DEPONENT: It's my understanding
7 that that is the focus of their -- of the -- you
8 know, confusion and concern about confusion.

9 BY MR. RETTEW:

10 Q. Did you talk about different survey designs
11 during that meeting?

12 A. I don't have a specific recollection of
13 that. We certainly -- you know, it certainly would
14 have been an appropriate topic.

15 Q. Okay. Did you talk about specific
16 controls; do you remember?

17 A. I don't recall whether we discussed
18 specific controls at that point or not.

19 Q. And what happened after that meeting?

20 A. After that meeting, there were -- we
21 conducted some exploratory interviews at a mall in
22 New Jersey to get a better understanding of people's

1 awareness of various slogan's including "Life is
2 good." as well as recognition of different symbols
3 and logos. And finally, sort of testing different
4 ways of showing people products.

5 Q. Why did you do that?

6 A. It's an important step in any survey
7 research design is to first get a better
8 understanding. Often, your client's version of kind
9 of what people believe or know can be different than
10 what you actually find in the market and it's
11 important to test those things yourselves.

12 Q. What did this pretest show?

13 A. Pretest showed that -- that awareness of
14 Life is good. as a trademark was relatively low,
15 that awareness of LG was relatively high as a -- as
16 a company that most people associated with cell
17 phones. And kind of if we, you know, showed people
18 the Life is good. emblem and LG's use of "Life's
19 Good" with the face and the initials LG, that there
20 was -- that people saw the connection and identified
21 that in connection as being related to the use of
22 the phrase "Life's Good."

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1 by virtually anyone"?

2 A. The products that they make are not, you
3 know, exclusively, for example, male or female.
4 They're not just for people over 65. There's no
5 constraint on marketing that would prevent someone
6 from, if not actually purchasing an LG or Life is
7 good. product, from certainly considering it and
8 being in a position to react to the trademark.

9 Q. Have you ever done any other surveys where
10 the universe was all adults?

11 A. Well, sure. But I mean --

12 Q. What was the product involved in those
13 cases?

14 A. I mean, it wasn't necessarily a trademark
15 issue or litigation.

16 Q. I'm sorry. Let me clarify. Litigation
17 survey for a trademark case.

18 A. No. I don't -- wait a minute. Let me --
19 hold that answer for a second. Yeah. No, that's
20 fine. No is the answer.

21 Q. And you don't know whether the people
22 included in your survey own cell phones?

1 A. No.

2 Q. And you don't know if the people included
3 in your survey intended to purchase a cell phone?

4 A. That's correct.

5 Q. And you don't know if people in your survey
6 owned appliances?

7 A. That's correct. Well, okay. No.

8 Q. You don't know if the people in your survey
9 owned the type of appliances that LG makes?

10 A. That's okay. Well, okay. Although LG
11 makes refrigerators. And so to the extent that most
12 households in the U.S. have a refrigerator, you know
13 --

14 Q. Well, you don't know if people included in
15 your survey had actually bought appliances?

16 A. That's correct.

17 Q. And you don't know if people included in
18 your survey intended to buy appliances?

19 A. That's correct.

20 Q. And you don't know if people included in
21 your survey owned computer monitors?

22 A. That's correct.

1 Q. Or any other computer products?

2 A. That's correct.

3 Q. And you don't know if people included in
4 your survey intended to buy computer monitors?

5 A. That's correct.

6 Q. And you don't know if the people included
7 in your survey intended to buy any other computer
8 products?

9 A. That's correct.

10 Q. And you don't know if the people included
11 in your survey owned any Life is good. T-shirts?

12 A. That's right.

13 Q. And you don't know if the people included
14 in your survey intended to buy Life is good.
15 T-shirts?

16 A. That's correct.

17 Q. Now, you say you tested both forward and
18 reverse confusion in this survey; is that correct?

19 A. I think what I said was that the survey
20 that I conducted was equally applicable to forward
21 as well as reverse confusion.

22 Q. And you used a national sample in the

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1 BY MR. RETTEW:

2 Q. All right. Mr. Klein, with your universe
3 being everybody over 18 years of age, do you have
4 any sense of the census data on how many people that
5 is?

6 A. How many --

7 Q. How many people total were in your
8 universe; how many people would have qualified?

9 A. I thought, actually, I included that here,
10 but I didn't. It was on the document that was
11 produced yesterday, I guess. The document that says
12 quota.xls has census data in it.

13 MR. RETTEW: Let's go off the record for
14 a second.

15 (Marked, Exhibit 88, AMS 003591.)

16 BY MR. RETTEW:

17 Q. I'm showing you what's been marked
18 Exhibit 88. Does that help you answer my previous
19 question on what was the total number of adults in
20 the U.S. that could have qualified for the survey?

21 A. Yes.

22 Q. And what is that number?

1 A. 247,110,005.

2 Q. And you found that 18 -- you found that
3 there would be 18 percent confusion net?

4 A. That's correct.

5 Q. And so roughly how many people would that
6 be?

7 A. Approximately 44 and a half million people.

8 Q. And of that 44 and a half million people,
9 how many instances of actual confusion would you
10 expect there to be in this case?

11 A. I don't have a basis for making that
12 estimate.

13 Q. Would you -- just based on your experience
14 and expertise, would you expect that there would be
15 a lot of people would have expressed confusion?

16 MR. KIRBY: Object to the form. To
17 whom?

18 BY MR. RETTEW:

19 Q. To either party.

20 A. What I measured was likelihood of
21 confusion. And actual confusion is going to depend
22 on the extent to which LG continues to advertise and

1 overseeing the results of the interviews.

2 Q. And did any problems arise in this survey?

3 A. Yes.

4 Q. What happened?

5 A. As I say in the report, the Florida field
6 site had a -- where's the part that I identify. In
7 one location that was in Florida, our validation
8 identified a significant deviation from the
9 protocol. When we called people to ask them the
10 validation questions, we would ask them, "Did you
11 receive \$5 for your participation?" And the people
12 in Florida said, no, they didn't. They were told
13 they had to come back later to get their \$5.
14 That -- I mean, if they couldn't do that part right,
15 we simply discarded all those questionnaires without
16 reviewing them, although you have copies of them.

17 And in a second location, the particular
18 interviewer apparently falsified nine out of ten of
19 the first interviews she did, and we discarded all
20 of her work.

21 Q. How do you know -- well, what location was
22 that?

1 A. San Francisco.

2 Q. And how do you know she falsified her
3 interviews?

4 A. Well, okay, we assumed she falsified the
5 interviews since nine out of ten of the people that
6 we contacted that she claimed to have interviewed
7 did not acknowledge being interviewed.

8 MR. KIRBY: Sort of a give-away.

9 THE DEPONENT: There were --

10 BY MR. RETTEW:

11 Q. Any other problems?

12 A. And then there were four additional
13 interviews that that did not validate, but they were
14 scattered in locations and we decided to exclude
15 them as well.

16 One of the things that happens in mall
17 intercept studies is that when you ask people for
18 their name and phone number in order to do the
19 validation, some people don't want to be recontacted
20 and are -- and so they give you a -- or they give
21 you their work number, but you only get their first
22 name. And you call up asking for Jim at a company

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1 of 1,000 people, so you don't get the appropriate
2 validation. So as I said, there were four
3 additional interviews like that, two from Chicago,
4 one from Dallas, one from Des Moines. And we
5 excluded those as well.

6 Q. Have you ever had this many problems in a
7 survey?

8 A. No.

9 Q. Have you ever heard of there being this
10 many problems in a survey?

11 A. No.

12 Q. Do you usually discard the questionnaires
13 that are not validated?

14 A. Yes.

15 Q. That's your standard practice?

16 A. Yes.

17 Q. Did you discard any of the other surveys
18 that -- strike that. Let me ask a better question.

19 Of the surveys that didn't -- the
20 questionnaires that didn't validate, did you examine
21 the other questionnaires that were done by those
22 particular interviewers to see if there were

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1 problems that were systematic to the interviewer?

2 A. As I said, in San Francisco, nine out of
3 the ten interviews done by this particular
4 interviewer didn't validate. So we threw all of
5 hers away.

6 We did 100 percent validation. So the
7 only other site was the Florida site where, in
8 reality, we might have kept those, those interviews.
9 The field site said that the check hadn't -- they
10 didn't have the cash in their account to pay these
11 people. We sent them the check. Everybody else got
12 their checks. We don't know what happened there.
13 But it was just such a screwy thing to happen that
14 we felt better about throwing away the interviews
15 than, you know, accepting what was at least, I'd
16 say, a significant deviation from the protocol we
17 specified.

18 Q. When these documents were produced to us,
19 there were some sticky notes that had some
20 explanation of what appears to be an explanation of
21 why these were discarded.

22 A. Uh-huh.

1 BY MR. RETTEW:

2 Q. Mr. Klein, I've shown you what's been
3 marked as Exhibit 90. Can you tell me, after going
4 through it, what these are?

5 A. Well, I'm not sure whether we -- I mean, I
6 guess, first of all, these are all Florida
7 interviews. They were all discarded. I can find
8 out for you what "exhibit rotation error" means.

9 Q. Yeah. We would request that you do that
10 because that was going to be my next question: What
11 does that mean, exhibit rotation error?

12 A. Well --

13 Q. Is this the first time you've heard of
14 there being an exhibit rotation error?

15 A. Yes. At least to the best of my memory.

16 MR. KIRBY: What I can't tell you is
17 whether that sticky went to all of the interviews
18 attached to Exhibit 90 or just the front one. And
19 it could be a mistake on my behalf or by our copy
20 service. I just don't know.

21 BY MR. RETTEW:

22 Q. Do you, Mr. Klein, have any thoughts on

1 that, can you enlighten us as to whether that is the
2 case or is not the case? If you don't know then --

3 A. I don't know. I mean, I think I can --

4 MR. KIRBY: We can try to find out for
5 you.

6 THE DEPONENT: I can try to track it
7 down.

8 MR. KIRBY: If they threw them all out
9 for that other problem with the payment issue, it
10 was academic and they didn't pursue it. But we can
11 find out, too.

12 BY MR. RETTEW:

13 Q. I appreciate that. And rather than waste
14 your time, I'll just move on to the next one and
15 just ask that you follow up on that.

16 (Marked, Exhibit 91, AMS 000430-000477.)

17 BY MR. RETTEW:

18 Q. The next one I'm showing you is Exhibit 91.
19 It's got a Post-it that says, "Bad skip pattern
20 errors caught by field site."

21 A. Right.

22 Q. My question is, what is this?

1 A. Well, I'll use the first one as an example.
2 I'll assume that the -- or I can go through each one
3 to make sure that it's the same way. But what this
4 would -- yeah, it looks like they're all done the
5 same way. If you look at question 3, page AMS 434.

6 Q. Yes.

7 A. So this person said "different companies"
8 and was supposed to have skipped then to question 4.
9 Okay? And instead, the interviewer continued with
10 question 3A. Now, these interviews and screeners
11 were all prenumbered with the rotation and exhibit
12 rotation marked on them. And so this was caught by
13 the field site and replaced -- you know, they did an
14 extra interview to replace it. But they returned
15 the documents to us so we would have the complete
16 set. But these would not be part of the data set
17 that was analyzed.

18 Q. So documents 430 to 477 were all excluded?

19 A. Yes.

20 Q. And were all of Barbara Jackson's
21 interviews excluded?

22 A. Well, these weren't Barbara Jackson's

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1 report?

2 A. Right.

3 Q. And these interviewer errors spanned among
4 different interviewers and different markets?

5 A. Yes.

6 Q. Does this at least suggest to you that
7 perhaps the questions were confusing for
8 interviewers?

9 A. No.

10 Q. But you've never seen this many mistakes
11 before.

12 A. Correct.

13 Q. What does that tell you, if anything?

14 A. We did a really bad job of laying out the
15 questionnaire. I mean, it should have been much
16 clearer to the interviewers that -- where they went
17 at each -- at each stage. And there should have
18 been arrows on these pages; and when they got here
19 it should have said, end. You know, if you've done
20 something here, you're done, you know, go on. It
21 was -- it was laid out in a way that was confusing
22 to interviewers, and they -- when they weren't able

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1 to follow the instructions, we didn't feel we could
2 include those results that didn't follow the
3 instructions, regardless of what those results were.

4 MR. RETTEW: Mark this one.

5 (Marked, Exhibit 94, AMS 000586-000810.)

6 BY MR. RETTEW:

7 Q. Okay. Mr. Klein, looking at Exhibit 94,
8 this says "tossed because of site error." And my
9 question is, were all of the interviews shown in --
10 excuse me -- all the questionnaires shown in
11 Exhibit 94 excluded?

12 A. Yes.

13 Q. And was this for the reasons you said
14 earlier, for the site error in Fort Lauderdale?

15 A. That's correct. At least, I mean, that's
16 why I would have tossed them all. They are all from
17 Fort Lauderdale and none of them are in the
18 database.

19 Q. Are part of the problems with this
20 interview due to the company that you used to
21 administer the survey?

22 A. I don't think so. I think it was the --

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